IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NO. 70-154

JOHNNIE PRUETT,

Petitioner

v.

THE STATE OF TEXAS AND J. F. CLAWSON, JR.

Respondents

BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the State of Texas, Respondent herein, and files this its response to Petitioner's petition for writ of certiorari heretofore filed herein.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas was delivered on March 31, 1971, stating that no motion for rehearing would be entertained. The case is reported at 465 S.W.2d. 164 (Tex. Crim. 1971).

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C., Section 1257(3), and Supreme Court Rule 19, paragraph 1(a). The record in this cause clearly shows that the petitioner's claims herein are based primarily upon the refusal of the Court of Criminal Appeals to allow him to intervene in a mandamus action brought by District Attorney Vance against District Judge Clawson. The record of proceedings and the opinion of the Court of Criminal Appeals in that cause clearly reflect that the primary issues upon which the petitioner relies to show jurisdiction in this Court were not decided by the Court of Criminal Appeals. The basic issue decided by the Texas Court of Criminal Appeals was whether or not a state district judge had the authority, under the statutes of the State of Texas, to order petitioner's discharge, thereby circumventing the mandate of the Court of Criminal Appeals which had remanded petitioner to the custody of the Texas Department of Corrections. The Court of Criminal Appeals was not called upon to, and did not rule upon, petitioner's claim that he was entitled by reason of the equal protection clause of the Fourteenth Amendment to the United States Constitution to credit on his sentence for good conduct time accrued. Further, the statutes of the State of Texas authorize an orderly procedure by

which the petitioner's claims can be litigated in the courts of the State of Texas, which procedure the petitioner deliberately bypassed and has continued to bypass. Article 11.07 of the Texas Code of Criminal Procedure provides a procedure by which the petitioner could present each and every question presented herein pertaining to credit on his sentence for his time served while awaiting the outcome of his appeal to the Texas Court of Criminal Appeals for a decision. This is a remedy which is widely known and widely used in the State of Texas. Grounds for relief must first be presented to the convicting court, but the Court of Criminal Appeals is the only court that can order the petitioner discharged. *Ex parte Young*, 418 S.W.2d 824 (Tex. Crim. 1967).

From an examination of this record, it is obvious that in this cause it was not necessary for the Texas Court of Criminal Appeals to decide any question pertaining to the petitioner's rights under the Constitution of the United States. Since the decision of the Federal question was not necessary to the determination of that cause, it should not now be reviewed by this Court. *Honeyman v. Hanan*, 300 U.S. 14 (1937), appeal dismissed, 302 U.S. 375. Furthermore, since the Teas Court of Criminal Appeals did not decide these issues, this Court should not undertake a review of what was not decided. *Walters v. City of St. Louis*, 347 U.S. 231 (1954).

Since petitioner was afforded an opportunity under the statues of the State of Texas to litigate all issues which he now presents, he was not denied due process of law by refusal of the Texas Court of Criminal Appeals to allow him to intervene in this proceeding.

Respondent respectfully submits that the jurisdictional requirements of this Court have not been satisfied and that no substantial Federal question is presented herein.

QUESTIONS PRESENTED

Respondent does not feel that the questions as detailed by the petitioner in his petition for writ of certiorari are properly before this Court for determination. A sifting through the myriad and multifariously intertwined questions presented by petitioner leaves the respondent to conclude that two primary questions are presented to this Court:

I. Was the petitioner denied due process of law by the refusal of the Texas Court of Criminal Appeals to allow him to intervene in the proceeding before that Court?

II. Is the petitioner entitled to credit on his sentence for good conduct time by reason of the statutes of the State of Texas and the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petinent provisions of the Constitution of the United States and the statutes of the State of Texas are adequately set forth in petitioner's application except for Article 11.07, Texas Code of Criminal Procedure, which is hereinafter set forth in its entirety in Appendix "A", and Texas Attorney General's Opinions Nos. C-310 and WW-1326, which are attached hereto as Appendix "B" and Appendix "C."

STATEMENT OF THE CASE

The petitioner was convicted on July 25, 1969, of the offense of sodomy, in the District Court of Coryell County, Texas, 52nd Judicial District. His punishment was assessed at confinement in the Texas Department of Corrections for a term of two years. This conviction was affirmed on appeal, *Pruett v. State*, 463 S.W.2d 191 (Tex. Crim. 1970), and the mandate of the Court of Criminal Appeals was issued on March 3, 1971, commanding the trial court "to observe the order of our said Court of Criminal Appeals in this behalf and in all things to have it duly recognized, obeyed and executed." On March 8, 1971, the petitioner presented a motion to Judge Clawson, Judge of the 169th Judicial District Court, sitting in the 52nd Judicial District Court of Coryell County by reason of administrative assignment. This motion sought credit upon the sentence for the time which the petitioner had been in jail pending appeal and additional credit upon his sentence under the provisions of Article 5118(a), Vernon's Annotated Civil Statutes of Texas. As a result of this motion and the hearing conducted thereon, the Judge subtracted from the petitioner's two-year sentence the total of 19 months and 14 days. Although the order does not set forth the exact allocation of this time, it apparently is based upon credit for 39 days of pre-sentence custody, 18 months from date of sentence to date of issuance of mandate by the Court of Criminal Appeals and 5 days intervening between date of mandate and the hearing. *State ex rel. Vance v. Clawson*, 465 S.W.2d 164, 166 (Tex. Crim. 1971), footnote 1. Judge Clawson then determined that petitioner was entitled to "good time credit equal to 1/3 of the days actually served in jail in

the amount of 6 months and 24 days" and ordered the petitioner released and discharged from custody. The State of Texas, acting by and through District Attorney Vance, then brought a petition seeking a writ of prohibition against Judge Clawson to enforce the mandate issued by the Court of Criminal Appeals. The petitioner sought to intervene in this prohibition or mandamus proceeding, but leave to do so was denied by the Texas Court of Criminal Appeals. The Texas Court of Criminal Appeals then determined that the trial judge had no authority to grant credit to petitioner under the provisions of Article 5118(a) and to discharge him, and to that extent his order was void. The Court went on to point out that its writ of mandamus would issue requiring the judge to perform the ministerial duty of carrying out the mandate of the Court unless he set aside that portion of the order granting petitioner "good time" credit on his sentence, ordering him arrested, and then carried out the mandate of the Court of Criminal Appeals.

ARGUMENT AND AUTHORITIES

I. Was procedural due process denied petitioner by the Court of Criminal Appeals refusing to allow him to intervene in this mandamus action?

Since the petitioner was indirectly affected as a result of the outcome of the mandamus action, his argument that he was denied procedural due process might carry some ring of validity if this was the only remedy open to him. However, the statutes of the State of Texas clearly provide a procedure by which petitioner's grievances can be determined. Article 11.07, Texas Code of Criminal Procedure (Appendix

"A") sets forth the method by which any person finally convicted of a felony can file an application for writ of habeas corpus in the convicting court which can then make a return of its findings of fact and conclusions of law to the Court of Criminal Appeals, whereupon that Court shall then enter its judgment remanding the petitioner to custody or ordering his release as the law and facts may justify. This statute also provides that "the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner." This method may be used to determine what credit for time on appeal a convicted felon is entitled to. *Ex parte Griffith*, 457 S.W.2d 60 (Tex. Crim. 1970); *Ex parte Washburn*, 459 S.W.2d 637 (Tex. Crim. 1970).

It would then appear that petitioner's claim that he was denied procedural due process is completely destroyed by the showing that he has refused to seek relief along that avenue which has been provided for him. At no time has petitioner presented the constitutional issues which he now raises to the convicting court for a writ of habeas corpus returnable to the Texas Court of Criminal Appeals to determine whether he is entitled to relief. The only thing which the petitioner has been denied in this regard is his right to intervene in an action which was brought for the sole determination of whether or not the trial judge had interfered with the jurisdiction of the Texas Court of Criminal Appeals by ordering petitioner's discharge. Only the Court of Criminal Appeals, and not the district court, has authority to order his discharge.

II. Was petitioner denied any constitutional right when he was denied eligibility for good time credit while in the county jail awaiting appeal?

First of all, it cannot be overly emphasized that respondent's position is that this issue has not been decided by the Texas Court of Criminal Appeals. In the instant proceeding, the Texas Court of Criminal Appeals only decided whether or not the statutes of the State of Texas authorize such credit and whether or not a district judge had the authority to grant such credit and order the petitioner discharged. In light of the statutory construction that such a grant of credit was not authorized and in view of the provisions of Article 11.07, Texas Code of Criminal Procedure, wherein the Legislature of the State of Texas created an exclusive remedy for review of the convictions of all persons in the State of Texas finally convicted of a felony and making such remedy exclusive of any other proceeding, the petitioner has not properly presented this constitutional issue to the Texas Court of Criminal Appeals nor has that Court ruled thereon.

As to the merits of petitioner's contention that the failure to grant credit for good time to a man awaiting the outcome of his appeal constitutes a violation of the equal protection clause of the United States Constitution, it appears that the petitioner fails to make a necessary and proper disinction between "punishment" and "reward." Article 5118(a) provides for the award of good conduct time to county jail prisoners by the sheriff "in order to encourage county jail discipline." Article 6184(l) of Vernon's Annotated Texas Civil Statutes provides for a "reward to be bestowed on prisoners for good conduct . . ." "in order to en-

courage prison discipline . . ." Article 5118(a) applies only to county jail prisoners serving a final conviction for a misdemeanor and places the discretion for the exercise of this credit in the hands of the sheriff and not in the district judge. *State ex rel. Vance v. Clawson*, supra; Texas Attorney General's Opinions Nos. C-810 and WW-1326. Article 6184(l) applies to prisoners convicted of a felony and actually in the custody of the Texas Department of Corrections. *Ex parte Baird*, 228 S.W.2d 511 (Tex. Crim. 1950); *Ex parte Johnson*, 311 S.W.2d 861 (Tex. Crim. 1958).

Since the question has not been litigated below, the record in this cause fails to indicate what purpose the Legislature of the State of Texas had in mind when it enacted the statutes in question. They, of course, serve the obvious purpose set forth in the statutes to encourage discipline and to reward good conduct. Other than this, it can only be surmised that the Legislature intended to make a distinction between those who were finally convicted and those who were not, based upon the premise that only those who were finally convicted would be proper subjects for any attempt at rehabilitation. The encouragement of good conduct for those subject to rehabilitation programs would of course encourage their participation in such programs. At the same time, the Legislature, in its wisdom, might also determine that those persons who are not finally convicted, whether of a misdemeanor or a felony, should not be subject to programs for rehabilitation for the reason that they have obviously not accepted the fact that they were properly convicted, and for the further reason that if they receive punishment of 15 years or less they would be entitled to end their incarceration by making bail. Therefore,

it would appear that there is a valid distinction between the classes of prisoners, and the Legislature has merely failed to offer a "reward" for good conduct to those prisoners who have not been finally convicted. It is therefore obvious that petitioner fails to receive a "reward" for good conduct not by reason of his appeal, but rather by reason of his status as a person not finally convicted; and he suffers no "penalty" merely because he has not reached a status where good behavior is encouraged. Equal protection does not require that all person be treated identically, it merely requires that a distinction have some relevance to the purpose for which the classification is made. *Baxstrom v. Herold*, 383 U.S. 107 (1966).

To hold that failure to offer a reward for good conduct to a prisoner is within the doctrine laid down in *North Carolina v. Pearce*, 395 U.S. 711 (1969), certainly appears to go far beyond the holding in that case. The respondent readily agrees that failure to grant credit for time served, either awaiting appeal or on a prior conviction, would tend to be a punishment which would deny a person free access to the appellate courts. However, it would appear that failure to offer a "reward" for good conduct to a person who is obviously not a good subject for rehabilitation would certainly not be "punishment" within the concept of that theory. Respondent is well aware that this Honorable Court has indicated in *North Carolina v. Pearce*, supra, footnote 13, that credit for punishment already exacted would include time credited during service of the first prison sentence for good behavior. However, this obviously refers to a situation where good time has vested and cannot be taken away by reversal of the conviction, and would not refer to

the instant situation where the petitioner has never become eligible for good time credit.

As the petitioner points out in his supplemental brief filed in this Court, the United States District Court for the Western District of Texas, Austin Division, in Cause No. A-71-CA-50 styled Johnnie Pruett v. State of Texas, et al, entered its order on August 24, 1971, granting a petition for writ of habeas corpus. Petitioner correctly states that this cause is being appealed to the Fifth Circuit Court of Appeals and is not final. It should also be noted that this cause contains exactly the same issues between exactly the same parties as is presently pending before this Honorable Court. Again, the respondent respectfully differs with a number of findings in Judge Suttle's opinion, most particularly his determination that the classification in the instant case was both unjustified and unreasonable. Contrary to his holding, the respondent respectfully contends that good time credit was not available to the petitioner, not because he appealed his conviction but because his conviction was not final. Further, this classification by the Legislature, as heretofore pointed out, is both reasonable and justified under all of the circumstances, and the failure to offer the petitioner a reward does not serve as an unreasonable impediment to appellate review of his criminal conviction.

The respondent also respectfully takes issue with Judge Suttle's finding that the petitioner has exhausted state remedies by presenting his claim to the convicting court and the highest appellate court in the State. Respondent again respectfully points out that the issues presented here were not presented to the

Texas Court of Criminal Appeals and have not been ruled upon by that Court. Since the issue before Judge Suttle is exactly the same as the issue before this Honorable Court, respondent respectfully prays that this Court issue its order consolidating that cause with the present cause for determination by this Court, if this Court determines that it has jurisdiction over the subject matter of this petition.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that this Honorable Court does not have jurisdiction over the matter herein presented by the petitioner. In the alternative, and in the event that this Honorable Court does find that it does have jurisdiction of this cause, the respondent further submits that there is not present in the instant case any substantial Federal question, and therefore no reason exists for granting the writ.

Respectfully submitted,
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Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

ALBERT WALKER
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Max P. Flusche, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Brief in Opposition has been served on counsel for the Respondent by depositing same in the United States Mail, postage prepaid, addressed to Mr. David L. Tisinger, 402 First National Life Building, Austin, Texas 78701, on this.....day of October, 1971.

.....

MAX P. FLUSCHE
Assistant Attorney General

APPENDIX "A"

Art. 11.07 Return to certain county; procedure after conviction

After indictment found in any felony case, and before conviction, the writ must be made returnable in the county where the offense has been committed.

After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas. The writ may issue upon the order of any district judge, and said judge may upon presentation to him of a petition for said writ, set the same down for a hearing as to whether the writ should issue, and ascertain the facts, which facts shall be transmitted to the Court of Criminal Appeals with the return of the writ if same is issued after such hearing. Provided further, that should such writ be returned to the Court of Criminal Appeals without all the facts deemed necessary by the Court of Criminal Appeals, said court may designate and direct any district judge or judges of this state to ascertain the facts necessary for proper consideration of the issues involved. When a petition for writ of habeas corpus presented to the judge of the convicting court contains sworn allegations of fact, which, if true, would render petitioner's confinement under the felony conviction illegal, the attorney representing the state in said court and the Attorney General of Texas shall be afforded an opportunity to answer such allegations, and if it appears that there are issues of fact which are material on the question of whether the petitioner is illegally restrained which have not been resolved, the petitioner may be granted a hearing on

such issues of fact and the judge conducting such hearing shall make and file his findings of fact and conclusions of law. It shall be the duty of the official court reporter of the district judge or judges so designated to forthwith prepare a narration of the facts adduced in evidence upon any such hearing and transmit the same, together with the judge's findings of fact and conclusions of law, to the clerk of the Court of Criminal Appeals within ten days of the date of such hearing. And it shall be the duty of the district clerk of the county wherein the writ is issued to make up a transcript of all pleadings in such case and to transmit the same within thirty days to the clerk of the Court of Criminal Appeals. Provided, that upon good cause shown, the time may be extended by the Court of Criminal Appeals for filing of such narration of facts or transcript.

The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal. Upon reviewing the record the court shall enter its judgment remanding the petitioner to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

Upon any hearing by a district judge by virtue of this Act, the attorney for petitioner, and the state,

shall be given at least three full day's notice before such hearing is held.

Amended by Acts 1967, 60th Leg., p. 1734, ch. 659, § 7, eff. Aug. 28, 1967.

APPENDIX "B"

Honorable Vernon D. Adcock
County Attorney
Dawson County
Lamesa, Texas

Opinion No. C-310

Re: Authority of a sheriff to grant commutation of time for good conduct under Article 5118(a), Vernon's Civil Statutes, to a prisoner incarcerated under a sentence for a felony offense, and related questions.

Dear Mr. Adcock:

You request our opinion construing Article 5118(a), Vernon's Civil Statutes, with regard to its application to the facts which you set out in your letter as follows:

> "Prisoner, on his plea of guilty, was found guilty of a felony offense by the District Court, and sentenced to a term of years of not less than two (2) nor more than four (4). Said prisoner was not transferred to the Texas Department of Corrections, but was incarcerated in the County Jail, where he had been a trusty. This arrangement was with the full approval and consent of said prisoner. On July 15, 1964, said prisoner had served three (3) years of his four (4) year sentence."

In light of the facts as set out, you request our opinion on the following questions:

> "(1) Does the Sheriff in charge of the County

Jail wherein prisoner is confined have the authority to commute the time of prisoner's sentence for good conduct under Article 5118(a), Vernon's Civil Statutes of the State of Texas?

"(2) Can Prisoner make application for and receive parole without being transferred to the Texas Department of Corrections?

"(3) Can prisoner make application for and receive a commutation of sentence by the Governor of the State of Texas, with the approval of the Board of Pardons and Paroles, without being transferred to the Texas Department of Corrections?"

In Attorney General's Opinion No. C-144, it was held that sheriffs have the authority to award commutation of time for good conduct, pursuant to Article 5118(a), Vernon's Civil Statutes, to a prisoner serving in jail under a judgment imposing a jail sentence or a fine.

However, this opinion is not directed to the situation which you have outlined, that is, a prisoner incarcerated in the County Jail who is under sentence in a felony case where the punishment imposed was a term of years in the state penitentiary. There is no statutory or other authority permitting a prisoner under a penitentiary sentence to serve such sentence in the county jail; on the contrary, the county authorities are required to deliver such a prisoner to the Texas Prison System (Attorney General's Opinion No. 0-6177). Article 5118(a) can have no application to such a prisoner and to the instant situation. Therefore, while we answer your first question in the affirmative

—a sheriff does have authority to commute the time of a jail sentence for good conduct under Article 5118(a)—his authority extends only to such prisoners who are in his custody under sentence imposing a term to be served in jail or where a prisoner is laying out a fine and not to prisoners sentenced to a term in the penitentiary.

Your second question, "Can a prisoner make application for and receive parole without being transferred to the Texas Department of Corrections," is answered by the Adult Probation and Parole Law of 1957, Article 781d of the Code of Criminal Procedure. Section 12 of Article III of this Act refers to the matter of paroles in the following language:

> "Sec. 12. The Board of Pardons and Paroles created by Article 4, Section 11 of the constitution of this state, shall administer the provisions of this Act respecting determinations of which prisoners shall be paroled from *the Prison system of this state*, the conditions of such paroles, and may recommend the revocation of paroles by the Governor." (Emphasis added)

It is clear that only prisoners confined in the "Prison System of this State" are subject to the terms of the Act and are eligible for parole. Article 6166a-1 of Vernon's Civil Statutes changed the name of the Texas Prison System to the Texas Department of Corrections.

Accordingly, in answer to your second question, we hold that a prisoner must be transferred to the Texas Department of Corrections before he can make application for and receive parole.

With reference to the third question which in substance is "Can a prisoner receive a pardon or commutation of sentence from the Governor with the approval of the Board of Pardons and Paroles without being transferred to the Texas Department of Corrections," we answer such question in the affirmative.

Section 11 of Article IV of the Constitution of Texas gives to the Governor the power to grant reprieves and commutations of punishment and pardons upon the written recommendation and advice of a majority of the Board of Pardons and Paroles under such rules and procedures as the Legislature may prescribe. The Legislature has made no rule or requirement which would prevent a prisoner incarcerated in county jail from receiving a commutation of sentence or a pardon or that would require such prisoner to be transferred to the Texas Department of Corrections before being eligible to receive a pardon or commutation.

SUMMARY

1. A sheriff has authority to award commutation of time for good conduct under the authority of Article 5118(a), Vernon's Civil Statutes, to a person serving time in a county jail under a judgment imposing a jail sentence or a fine. However, this statute has no application to a prisoner incarcerated in county jail under a sentence calling for imprisonment in the penitentiary, and in such case the sheriff cannot make any commutation of the sentence.

2. A prisoner must be transferred to the Texas Department of Corrections before he can make

application for parole.

3. The Governor has the power upon the recommendation and advice of the Board of Pardons and Paroles to commute the sentence of a prisoner whether he be incarcerated in a county jail or in the penitentiary.

Very truly yours,
WAGGONER CARR
Attorney General of Texas

APPENDIX "C"

Honorable Brandon Bickett
County Attorney
Blanco County Courthouse
Johnson City, Texas

Opinion No. WW-1326

Re: Authority of a sheriff to grant one-third commutation of time for good conduct to a jail prisoner who is serving out his fine, and related questions.

Dear Mr. Bickett:

In your letter you asked the following questions:

> "Whether it is legal for the Sheriff in charge of a County Jail to grant one-third commutation of time for good conduct to an inmate or prisoner who is in jail serving out his fine in the same manner as he would grant such commutation of time to an inmate or prisoner who is in jail serving out his jail sentence.
>
> "Also, in this connection, whether the Sheriff in charge has the sole discretionary power to grant such commutation of time, or must he be required to obtain permission or consent of the Judge of the Court in which the prisoner or inmate has been convicted.
>
> "And, further, does the County Judge, or the Sheriff, have charge and control of the collection of a fine assessed by the Judge?"

Your opinion request further advises us that the prisoner in question was charged with the offense of

"unlawfully hunting deer from an automobile," and after pleading guilty was assessed a fine and court costs. Being unable to pay his fine, he then served a portion of his fine in jail until being released by the Sheriff, purporting to act under Article 5118a, Vernon's Civil Statutes.

Article 5118a, V.C.S. reads as follows:

> "In order to encourage county jail discipline a distinction may be made in the term of prisoners so as to extend to all such as are orderly, industrious and obedient, comforts and privileges according to their deserts; the reward to be bestowed on such prisoners for good conduct shall consist of such relaxation of strict county jail rules, and extension of social privileges as may be consistent with proper discipline. Commutation of time for good conduct, industry and obedience may be granted the inmates of each county jail by the sheriff in charge. A deduction in time not to exceed one third (1/3) of the original sentence may be made from the term or terms of sentence when no charge of misconduct has been sustained against the prisoner. A prisoner under two (2) or more cumulative sentences shall be allowed commutation as if they were all one sentence. For such sustained charge of misconduct in violation of any rule known to the prisoner (including escape or attempt to escape) any part or all of the commutation which shall have accrued in favor of the prisoner to that date of said misconduct may be forfeited and taken away by the sheriff. No other time allowance or credits in addition to the commutation of time for good conduct herein provided for may be deducted from the term or terms of sentences."

Article 785, C.C.P. reads:

> "When the judgment against a defendant is for

a fine and costs he shall be discharged from the same:

"1. When the amount there has been fully paid.

"2. When remitted by the proper authority.

"3. When he has remained in custody for the time required by law to satisfy the amount thereof."

In the event the defendant, who has been assessed a fine and cost, refuses or is unable to pay the same, he may "lay out" such fine and costs at the rate of $3.00 per day, until the fine and costs are satisfied. If, after entering the jail and serving one or more days, he is able to raise some money to apply on the fine and costs, he will receive credit on such fine and costs at the rate of $3.00 for each day served, and is only required to pay the balance due in order to secure his release. Art. 793, C.C.P. The punishment assessed against such defendant never consisted of a term in the county jail. He is only there by reason of his failure to pay the fine and costs. His release may be secured at any time by payment of the balance due on the fine and costs, either by himself or paid for him by his friends or relatives. Since his punishment only consists of a fine and costs, to bring him within the provisions of Article 5118a, V.C.S., would be to permit the sheriff to remit a portion of a cash fine, which Art. 5118a does not purport to do. In answer to your first question, we hold that Article 5118a, V.C.S. has no application to a prisoner in the county jail whose sole punishment is a fine and costs, and who is "laying out" the same.

Attorney General's Opinion No. WW-918 states that under Article 5118a, V.C.S.:

> ". . . the sheriff is given the discretion of giving a prisoner a deduction in time even though he has a record of good conduct. This simply means that where a prisoner has an unquestioned good conduct record, the sheriff is not under a duty to release him in less time than called for in the sentence. . . ."

The sheriff is the custodian of prisoners in the county jail. Art. 265, C.C.P. Art. 5118a, V.C.S. was enacted to assist the sheriff in maintaining proper discipline in the jail. We hold, therefore, in answer to your second question, that the sheriff has the sole discretion under Art. 5118a, V.C.S. in granting commutation of time of those prisoners in his custody serving jail terms in the county jail. The judge of the court in which the prisoner was convicted has no powers or authority under Art. 5118a, V.C.S.

Art. 1616, V.C.S. reads:

> "An account shall be kept with the sheriff charging him with *all* judgments, *fines*, forfeitures and penalties, *payable to and rendered in any court of the county*, the collection of which he is by law made chargeable. The sheriff may free himself from liability from such charge, by:
>
> "1. Producing the receipt of the county treasurer showing the payment of such judgment, fine forfeiture or penalty.
>
> "2. Showing to the satisfaction of the commissioners court that the same cannot be collected, or that the same has been discharged by imprison-

ment or labor, or by escape, without his fault or neglect, and obtaining an order from said court allowing the same."

In *Bradley v. State*, 56 S.W. 114 (Civ. App., 1900, error refused), the Court permitted recovery from a former sheriff and his bondsmen for fines and costs assessed against defendants in the county court, which it was alleged that the sheriff had wilfully neglected and refused to collect. The Court reviewed Articles 838 and 839, Revised Statutes of 1895 (now Article 1616, V.C.S.), and stated at page 116:

> "... The county judge had no authority to direct the release of the parties without a discharge of the judgments against them in one of the modes provided by law. The power to remit fines is given by law to the governor alone. . . . These provisions of the Revised Statutes as well as of the Code of Criminal Procedure were enacted for the purpose of compelling the sheriff to do his duty in the collection of fines, and were made plain to meet just such cases as the present. . . ."

Attorney General's Opinion No. 0-3262 (1941) states:

> "You are respectfully advised that it is the opinion of this department that you should ordinarily look to the sheriff or constable as the case may be for the collection of fines and costs in misdemeanor cases."

In answer to your third question, we hold that the sheriff is charged with the collection of fines assessed in the county court.

SUMMARY

Art. 5118a, V.C.S., which authorizes a sheriff

to grant commutation of time to prisoners in the county jail for good conduct, has no application to a prisoner whose sole punishment consists of a fine and costs, and who is laying out the same in jail.

The sheriff has the sole discretion under Art. 5118a, V.C.S. in granting commutation of time of those prisoners in his custody serving jail terms in the county jail.

The sheriff is charged with the collection of fines assessed in county court.

Yours very truly,

WILL WILSON
Attorney General of Texas